



RECENT CHANGES TO THE PORTUGUESE PUBLIC CONTRACTS CODE

Decree-Law no. 78/2022, of 7 November has introduced new provisions and amendments to the **Portuguese Public Contracts Code**. See more below.

> **New document may be required: document demonstrating labour costs structure**

The contracting authority may now require a document demonstrating the costs structure of the labour required to perform the contract.

This document may be requested when the contract relates to a sector in which the fixed cost of labour is decisive in price formation.

The document must identify the costs resulting from payments imposed by law or by collective bargaining agreements, stipulating their exact or average amounts, and also the respective relative weight, expressed as a percentage. The terms in which the document must be drawn up will be ruled by a government Implementing Order that has not yet been published.

The document is classified, and therefore the contracting authority may not disclose the information contained in it.

> **New reasons for excluding proposals**

A proposal that does not include the document demonstrating labour cost's structure, when this is mandatory, will be excluded.

Although of little practice relevance, any proposals that clearly fail to respect the object of the contract will also be excluded.

> Possibility of correcting proposals

The jury must request candidates and tenderers to, within a maximum of 5 days, correct any procedural/formal irregularities in their applications and proposals that need to be corrected, provided that such correction is not likely to modify the content thereof and does not violate the principles of equal treatment and competition.

The decree-law expressly sets out some situations in which the jury must request correction of these irregularities:

- a) Failure to present or incorrect presentation of documents that merely prove facts or qualities prior to the date the application or proposal is presented, including the statements in Annex I and Annex V to the CCP or the European Single Procurement Document (ESPD).
- b) Failure to include the Portuguese language translation of documents presented in a foreign language.
- c) Lack or inadequacy of the signature, whether handwritten or electronic, of any documents included in the application or proposal, which may be corrected by including a ratification declaration that is duly signed and limited to the documents already submitted.

Failure to correct irregularities, within the legal time limit for the purpose, is considered a serious administrative offence, punishable with a fine of between € 5,000.00 and € 30,000.00.

> Requirements regarding workers assigned to the service provision

Workers assigned to the performance of contracts for the purchase of services with a term of more than 1 year must perform their activity under an employment contract of indefinite term.

Workers assigned to the performance of contracts for the purchase of services with a term of 1 year or less may perform their activity under a fixed term employment contract, provided that the term is not less than the term of the public contract.

The specifications shall include a clause stating that compliance with these legal obligations is mandatory.

Workers with a fixed term replacement contract may be excluded from these legal rules. This provision is also not applicable to workers who perform occasional tasks or specific services (non-durable) within the scope of performance of the contract.

Contracting of workers in breach of these new legal obligations is considered a very serious administrative offence, punishable with a fine of between € 7,500.00 and € 44,800.00.

> Warranty

The warranty period may not exceed 3 years, although it may be longer when, if it is an aspect submitted to competition, the competitor has proposed it.

The warranty period has been updated for contracts for the purchase of moveable property, now being longer than the period of 2 years previously laid down. This amendment is introduced to align the CCP with recent legislation on consumer issues.

> Complementary works

Complementary works are works that: (i) the type or quantity is not provided in the contract and (ii) are required for the performance of the contract.

This latter condition was not set out previously in the CCP, and limits the application of this regime when the extra work is not justified by the mere performance of the contract in force.

The contracting authority may order complementary works to be carried out if changing the coparty (i) is not feasible for economic or technical reasons, namely due to the need to ensure interchangeability or interoperability with the existing equipment, services or facilities, and (ii) it is highly inconvenient or leads to a considerable increase in costs for the contracting authority.

The rules on complementary works, which are directly applicable within the scope of public works contracts, are also applicable, supplementarily, with the necessary adaptations, to contracts for the purchase of goods and services.

> Option of direct award for the formation of contracts

Whatever the object of the contract to be entered into, the contracting authority may adopt direct award when, in a previous public tender procedure or restricted procedure with prior qualification, (i) no tenderer or applicant has presented a proposal or application, or (ii) all the proposals or applications have been excluded, provided that the exclusion is due to the proposals having clearly failed to respect the object of the contract to be entered into, or due to confirmation of impediments and false application documents, for example, respectively.

Notwithstanding, for the formation of contracts of a value lower than the European limits, that is, those that are not required to be published in the JOUE, direct award may still be adopted when, in a previous public tender procedure or restricted procedure with prior qualification, all the proposals or applications are excluded, regardless of the reasons for that exclusion.

Previously, the CCP allowed direct award to be used when all the proposals were excluded, without laying down any different treatment as regards the respective causes of exclusion.

All other situations where it was possible to choose the direct award method have remained.

> Entry into force and producing of effects

The legislative amendments to the CCP come into force on 2 December 2022, and apply to (i) public procurement procedures commencing from that date on and (ii) the contracts entered into under those procedures.

The new rules on complementary works apply to contracts (i) that result from procedures that commence after the entry into force or (ii) that are already being performed, provided that the basis for them results from a fact that occurs after that date ●